Despite evidence of mental retardation, Mississippi executes inmate by lethal injection

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Earl Wesley Berry was executed Wednesday evening at the Mississippi State Penitentiary at Parchman. His lethal injection was administered at around 6 p.m. local time after all last-minute appeals for a stay had been exhausted.

Berry's attorney provided evidence to state courts that he was mentally retarded, which would have rendered his execution unconstitutional, but he was denied an evidentiary hearing on procedural grounds.

The US Supreme Court denied his attorneys' request for a stay on Wednesday afternoon. Justice Antonin Scalia, and then the full court, denied the request for a stay, clearing the way for Berry's execution.

He was the second prisoner executed since the US Supreme Court ruled April 16 in a case brought by two Kentucky death row inmates that the lethal injection procedure does not constitute cruel and unusual punishment as banned by the Eighth Amendment to the US Constitution.

Georgia inmate William Earl Lund was executed on May 6, putting an end to an effective seven-month moratorium on executions in the US awaiting the outcome of the Kentucky case.

Earl Berry, 49, was convicted and sentenced to death for the 1987 beating death of Mary Bounds in north Mississippi. Earl's brother James, who first alerted authorities that his brother might be connected to the crime, recalled later, "They said if I told what I knew, they wouldn't even ask for the death penalty. But they did."

Berry confessed to the crime and refused a plea deal that would have given him life in prison. He was sentenced to death on October 28, 1988 after a jury trial.

The 1988 death sentence was overturned by the state Supreme Court, which found fault with the instructions given to the jury. At a re-sentencing hearing in June 1992, the defense presented evidence from a neuro-psychologist about Earl Berry's low intellectual functioning and possible brain damage. A psychologist also testified that Berry suffered from paranoid schizophrenia.

In his inflammatory closing statement to the jury, the prosecutor called for vengeance for Berry's victim, who had been a "faithful member of the First Baptist Church, a member of the choir, taught Sunday school." Urging them to vote for the death penalty, he said that "it's authorized by Mississippi, and it's been authorized by scriptural law for a long time." The jury voted for the death penalty.

In a divided ruling, the US Supreme Court ruled in June 2002 in *Atkins v. Virginia* that execution of the mentally retarded is unconstitutional. In 2004 in *Chase v. State*, the Mississippi Supreme Court laid down the criteria for determining which state inmates sentenced to death before the high court ruling should receive an evidentiary hearing on the basis of a mental retardation claim.

To qualify, a condemned prisoner must provide an affidavit from a mental health expert showing an IQ of 75 or lower, and that "there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded." For reasons that are not clear, Berry's public defenders at the time did not include such an affidavit with their claim of his retardation. In August 2004, the state Supreme Court denied him an evidentiary hearing on the basis of this legal technicality.

In a statement on Wednesday, Amnesty International said that there was "significant evidence that Earl Wesley Berry may have mental retardation" and called on Mississippi Governor Haley Barbour to halt his execution.

"In 2002, the Supreme Court banned the execution of people with mental retardation, yet Berry has been denied a hearing because a lawyer missed a deadline," the human rights organization stated. "Life and death cannot hinge on simple technicalities." The governor said Monday he would not grant clemency.

There was ample evidence to suggest that Earl Berry suffered from mental retardation. In an April 2008 affidavit filed by his new attorneys, a psychologist with expertise in mental retardation concluded that Berry had an IQ of 75 or lower and/or "significantly sub-average intellectual functioning" and determined that "to a reasonable degree of psychological certainty that further testing will demonstrate that Mr. Berry meets the criteria established by the

American Psychiatric Association and the American Association on Mental Retardation to be classified as mentally retarded."

The affidavit also noted that when Berry, then 25, was discharged from a Mississippi Department of Corrections prison hospital in April 1985 following an apparent suicide attempt, he received a final diagnosis of "suicidal gestures/mentally retarded." Other affidavits from relatives and acquaintances described his slow development as a child and childhood head injuries.

His mother, Velma Berry, said doctors told her he had the skill of a 7-year-old. He was never able to live independently and Mrs. Berry said he attempted suicide six or seven times.

His attorneys had appealed to the Supreme Court for a stay both on the basis of Berry's mental retardation as well as the unconstitutionality of Mississippi's lethal injection procedure. Mississippi state courts and the Fifth US Circuit Court of Appeals in New Orleans had previously ruled against him on both counts.

Jim Craig, one of Berry's attorneys, stated Tuesday, "The Mississippi protocol for lethal injections does not provide the same safeguards as the [Kentucky] process." He said his client was asking the high court "to review the facts of the Mississippi protocol for lethal injections to ensure that it provides adequate safeguards against low doses of anaesthetic and other issues that would cause excruciating pain and a torturous death."

Critics of the three-drug lethal injection procedure argue that if the first chemical, sodium thiopental, is mal-administered, the prisoner may not be rendered unconscious, meaning the prisoner can be subject to excruciating pain when the other two chemicals are injected: pancuronium bromide, which paralyzes muscle movement, and potassium chloride, which induces cardiac arrest. The Death Penalty Information Center lists 28 known incidents of botched lethal injections.

In refusing to stay the execution on the basis of Mississippi's protocol, it appears that the high court will be unwilling to hear or rule in favor in cases arguing the unconstitutionality of the lethal-injection procedure on a state-by-state basis.

While Earl Berry's challenge on the basis of his mental retardation was rejected by the state on the basis of a technicality, in a cynical twist a federal judge was able to look the other way when the technical violation was on the prosecution's side.

Mississippi Attorney General Jim Hood failed to respond to lethal-injection challenges filed by four death row inmates. The four had filed their challenges along with Earl Berry in October 2007. The judge dismissed Berry as a plaintiff in the case, but the attorney general never responded to the others.

In documents filed in US District Court in Greenville, Attorney General Jim Hood admits to the error, but claimed it was due to his office's preoccupation with appeals by Earl Berry.

On May 5, US District Judge Allen Pepper found Hood and his office in default for failure to defend the state against the plaintiffs' claim. Last Friday, however, Judge Pepper dismissed the default order, saying Hood's inaction "appears to be more of an issue of irresponsible behavior than it does willful disregard."

On Monday, the four inmates' attorneys said they would agree to the dismissal of the default judgment if Berry's challenge to the lethal-injection procedure were heard along with the others. Such a move would have necessitated staying Berry's execution and an agreement from the attorney general to put scheduling of all executions on hold pending the outcome of the challenge. Judge Pepper's lifting of the default order has enabled the executions to proceed on course.

Earl Wesley Berry was the 1,101st inmate put to death in the US since the Supreme Court reinstated capital punishment in 1976. Last October, he had eaten his last meal and was just 17 minutes from execution when he was granted a last-minute stay on the basis of the Kentucky case.

Tonight, May 22, the state of Georgia is scheduled to send condemned inmate Samuel David Crowe to his death. Through the end of October, a total of 20 other executions are planned in Virginia, Texas, South Carolina, Oklahoma, Florida and Louisiana.

As expected, last month's ruling by the Supreme Court has opened the way for re-starting the assembly-line of sanctioned state killings, a practice banned and condemned by the overwhelming majority of industrialized countries, including all of the European Union.